IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HYUN H. SEO-JEONG and MYUNG C. SEO, wife and husband, and the marital community composed thereof; and SONG GEUM JEONG and YOUN EUI YUN, husband and wife, and the marital community composed thereof, Appellants, v. DMITRIY KOSTENKO and JANE DOE KOSTENKO, husband and wife, and the marital community composed thereof, Respondents.	)	No. 57333-1-I DIVISION ONE UNPUBLISHED FILED: September 25, 2006

PER CURIAM -- Substitute service of process may be effected by leaving a copy of the summons and complaint at the defendant's house of usual abode with a resident of suitable age and discretion.[1] "Usual abode" is defined as a place where the defendant's domestic activity is centered and where service left with a family member is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance.[2] Where an

[1] RCW 4.28.080(15).

action is commenced by filing of a complaint, service of the defendant must be completed within 90 days to be effective.[3] Here, proper service of the summons and complaint was never made at the house of usual abode of Kostenko. Because service was not proper and there is no other reversible error, we affirm.

On June 14, 2002, Dmitriy Kostenko was involved in an auto accident with Hyun Seo-Jeong, Song Geum Jeong (collectively "Seo-Jeong"), and Youn Eui Yun. Seo-Jeong filed this action against Kostenko and his wife on June 7, 2005. Kostenko filed his answer on June 27, 2005, asserting that Seo-Jeong failed to issue sufficient process. Service of process had not been attempted prior to the time Kostenko filed his answer.

On June 28, 2005, the day after Kostenko filed his answer, a process server delivered a copy of the summons and complaint to a person the process server identified in the return of service confirmation as "Jane Doe Kostenko," at 2705 SW 332nd Court, Federal Way, Washington. This address was the same address of record for Kostenko with the Department of Licensing. In addition, an Internet search listed the Federal Way address as Kostenko's residence. Kostenko and his wife, however, had not lived at that address since 2004. At the time of service at the Federal Way address, they resided at 4155 S. 332nd Place, Auburn, Washington. Neither Kostenko nor his spouse has ever been served with process in this case.

---

[2] Gross v. Evert-Rosenberg, 85 Wn. App. 539, 542, 933 P.2d 439 (1997).

[3] RCW 4.16.170.

In October 2005, Kostenko moved to dismiss the action for insufficient service of process. The trial court dismissed the case.

Seo-Jeong appeals.

SERVICE OF PROCESS

Seo-Jeong advances several arguments to support the claim that the trial court erred in dismissing this action. None are persuasive.

RCW 4.16.170 provides that if an action is commenced by filing a complaint, the defendants must be served, personally or by publication, within 90 days of the date of the filing. Service of process is accomplished by delivering a copy of the summons and complaint to the defendant himself, or by leaving a copy at the defendant's house of usual abode with a resident of suitable age and discretion.[4]

Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[5] We consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party.[6] When reviewing an order for summary judgment, we evaluate the matter de novo, performing the same inquiry as the trial court.[7]

---

[4] RCW 4.28.080(15).

[5] CR 55(c).

[6] Id.

[7] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

For purposes of substitute service of process, "usual abode" is defined as a place where the defendant's domestic activity is centered and where service left with a family member is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance.[8] After filing the complaint, the plaintiff has 90 days to serve the defendant.[9] Here, service of process was made at Kostenko's former residence. Whether that was his house of usual abode is the primary issue.

RCW 4.28.080(15)

Seo-Jeong asserts that service was properly made on a resident of suitable age and discretion at the Kostenko's house of usual abode of record. For the purpose of substitute service of process, a defendant's usual abode is defined as a place where the defendant's domestic activity is centered and where service left with a family member is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance.[10] Whether a residence amounts to a place of usual abode is a question of law that we review de novo.[11]

Seo-Jeong only attempted service of process at the Federal Way residence. The record plainly shows that Kostenko's ties to the Federal Way

---

[8] Gross, 85 Wn. App. at 542.

[9] RCW 4.16.170.

[10] RCW 4.28.080(15); Gross, 85 Wn. App. at 542.

[11] Sheldon v. Fettig, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995), affirmed, 129 Wn.2d 601, 919 P.2d 1209 (1996).

residence were severed by the time Seo-Jeong attempted service of process. He had moved to the Auburn address years earlier. It is undisputed that Kostenko lived at the Auburn residence and has not lived at the Federal Way address since 2004. He has never been served at his Auburn address. Thus, service was ineffective.

Concealment

Under RCW 4.16.180, the statute of limitations is tolled for the period when a resident defendant is concealing himself or herself.[12] Concealment is defined for the purposes of RCW 4.16.180 as a "clandestine or secret removal from a known address."[13] Willful evasion of process is a necessary ingredient to toll the statute of limitations.[14]

Seo-Jeong contends that Kostenko concealed his current address for the purpose of evading proper service of process. Seo-Jeong's argument relies heavily on the fact that Kostenko had actual notice of the suit and failed to alert the opposing side of his correct address. However, under Washington's statutory requirements for effecting service of process, actual notice is irrelevant because "actual notice does not constitute sufficient service."[15]

---

[12] RCW 4.16.180.

[13] Caouette v. Martinez, 71 Wn. App. 69, 74, 856 P.2d 725 (1993) (quoting Patrick v. DeYoung, 45 Wn. App. 103, 109, 724 P.2d 1064 (1986), review denied, 107 Wn.2d 1023 (1987)).

[14] Rodriguez v. James-Jackson, 127 Wn. App. 139, 147, 111 P.3d 271 (2005).

[15] Gerean v. Martin-Joven, 108 Wn. App. 963, 972, 33 P.3d 427 (2001)

In addition, Seo-Jeong cites no authority for the proposition that these facts fall within the statutory definition, permitting tolling of the statute. Specifically, there is nothing to support the argument that the failure to report the new address to the Department of Licensing supports an inference of concealment. Moreover, there is no evidence in the record that Kostenko's sale of his home was clandestine, secret or done for the purpose of willfully evading process. Because there was no evidence suggesting that Kostenko concealed himself to avoid service of process, the statute of limitations was not tolled.

Oral Argument

Seo-Jeong argues that the trial court violated the local rules by refusing to hear oral arguments on Kostenko's motion to dismiss, but claims no prejudice. More specifically, Seo-Jeong asserts that under KCLR 7, only nondispositive motions may be heard without oral arguments.[16] Observation of local rules, however, is largely discretionary in the trial court**,** which has the inherent power to waive its own rules.[17] A trial court's interpretation of a local rule will not be disturbed unless the interpretation was clearly wrong, or an injustice has been done.[18]

(citing Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972)).

[16] KCLR 7(b)(2) states: "All nondispositive motions and motions for orders of default and default judgment shall be ruled on without oral argument, except for the following…[m]otions for which the Court allows oral argument."

[17] Raymond v. Ingram, 47 Wn. App. 781, 784, 737 P.2d 314, review denied, 108 Wn.2d 1031 (1987); Snyder v. State, 19 Wn. App. 631, 637, 577 P.2d 160 (1978).

On the record before us, we cannot conclude that Seo-Jeong was prejudiced by the trial court's decision to waive oral argument. We note that the notice of motion had a notation that the motion was without oral argument. Seo-Jeong did not object. There is no evidence that the outcome would have been different had the court heard oral argument. And we cannot say that the rule required oral argument in this case.

Waiver

Finally, Seo-Jeong contends that the trial erred in dismissing the case because the affirmative defense of insufficient service of process was waived. We disagree.

A litigant waives the defense of insufficient service of process unless the party asserts it either in a responsive pleading or in a motion under CR 12(b)(5).[19] Seo-Jeong asserts that Kostenko's answer raised the affirmative defense of insufficient process, not insufficient service of process.

Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless and the defense is not waived.[20] Here, Seo-Jeong understood that Kostenko

---

[18] Snyder, 19 Wn. App. at 637 (citing Burton v. Gilder, 106 Ga. App. 494, 127 S.E.2d 328 (1962) and United States Fidelity & Guar. Co. v. Lawrenson, 334 F.2d 464 (4th Cir. 1964)).

[19] CR 12(h).

[20] Bernsen v. Big Bend Electric, 68 Wn. App. 427, 434, 842 P.2d 1047 (1993).

asserted the defense of insufficient service of process in his answer. Indeed, Seo-Jeong's response in opposition to Kostenko's motion to dismiss acknowledges that Kostenko asserted the defense of insufficient services of process in his answer. Thus, even if Kostenko's answer did not properly assert the defense of insufficient service of process, it was not prejudicial.

We affirm the order of dismissal.

For the Court:

Cox, J.

Appelwick, C.J.

Schindler, A.C.J.